

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

Fifty California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • FAX: (415) 352-3606 • <http://www.bcdc.ca.gov>

December 1, 2000

TO: Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)
Ellen M. Sampson, Staff Counsel (415/352-3610 ellens@bcdc.ca.gov)

SUBJECT: Staff Recommendation to Adopt Proposed Amendments to Regulation Section 10713.5; Designation of Middle Harbor as an In-Bay Dredged Material Disposal Site (For Commission consideration on December 7, 2000)

Summary of Recommendations

The staff recommends that the Commission adopt proposed amendments to the California Code of Regulations, Title 14, Division 5, Section 10713.5. The proposed amendments would: (1) designate the Middle Harbor for use as a dredged material disposal site provided an array of criteria for the use of the site are satisfied; (2) state that the designation does not preclude the need for a Commission permit or substitute for findings required under the McAteer-Petris Act or *San Francisco Bay Plan* policies; (3) specify the legal description for the Middle Harbor site; and (4) correct clerical errors.

Staff Report and Recommendations

Proposed Amendments to Regulation and Modifications

On June 2, 2000, the Commission published a Notice of Proposed Rulemaking that would amend Commission Regulations Section 10713.5. That Section contains the sites that the Commission has designated for the in-Bay disposal of dredged material. The amendment would designate the Port of Oakland's Middle Harbor as a site for the placement of dredged material to create Bay habitat, and would place limiting criteria on the type of project that could be authorized there. On June 16, 2000, the Commission published a Draft Environmental Assessment (Draft EA) that evaluates the impacts of the proposed regulation.

On August 17, 2000, the Commission held a public hearing on the proposed regulatory amendment and the Draft EA. In response to comments from the Port of Oakland, on August 22, 2000, the Commission published modifications to the proposed regulation and clarifications and corrections to the Draft EA. The regulation was modified to more accurately refer to the type of use that could be made of the Middle Harbor, and to correct the legal description for Middle Harbor. The Draft EA was changed to incorporate updates and corrections submitted by the Port.

On September 21, 2000, the Commission held a second hearing on the modifications to the regulation and changes to the Draft EA. The Commission did not receive any further comments on the Draft EA. In response to new public comments concerning the proposed regulation, on October 6, 2000, the Commission published further proposed modifications that would: (1) re-organize the description of the type of project that could occur in the Middle Harbor by using separately numbered paragraphs for each of the limiting criteria; and (2) clarify or

strengthen some of the criteria in order to ensure that a project would be successful. For example, the proposed text would identify the elements that must be included in a plan to create Bay habitat at Middle Harbor and would specify when the Port of Oakland must obtain a Commission permit for management of the site once the project goals have been achieved.

On November 2, 2000, the Commission held a public hearing on the proposed, modified regulation. In response to public comment, on November 21, 2000, the Commission published a notice of changes to the proposed regulation that would clarify that the designation of the in-Bay disposal sites, with limiting criteria, does not preclude the need for a BCDC permit and does not substitute for findings the Commission must make under its laws and policies. Two other changes are clerical in nature, are not substantive, and do not alter the effect of the regulation. One would correct the phrase “designed” in-Bay disposal sites to read “designated” in-Bay disposal sites. The second corrects the reference to the “San Francisco Bay Plan.” While the Commission will not hold a further public hearing on these modifications, the public has fifteen days to submit written comments before the Commission votes on this proposal on December 7, 2000.

The modifications to Section 10713.5 presented in this recommendation would clarify and make more specific the circumstances under which the Middle Harbor could be used as a dredged material disposal site. They do not substantively change the originally-proposed regulation nor its potential environmental impacts, and a reasonable person could have anticipated the types of modifications that have been made to the original proposed text that was published on June 2, 2000.

In conclusion, the staff recommends that the Commission adopt the proposed regulation. The proposed text is included in this report. If the Commission adopts the proposed regulation the staff will submit the rulemaking file to the state Office of Administrative Law and the federal Office of Ocean and Coastal Resources Management for review and approval. Once passed by these agencies, the Commission’s regulations will be effective.

Environmental Assessment

On June 16, 2000, the Commission published a Draft EA that evaluates the impacts of the proposed regulation. On August 17, 2000, the Commission held a public hearing on the proposed regulatory amendment and the Draft EA. In response to the one comment letter received from the Port of Oakland, on August 22, 2000, the Commission published clarifications and corrections to the Draft EA. Specific responses to the Port’s comments are noted below in the section entitled Responses to Public Comments.

Although the Commission held a hearing on the changes to the Draft EA on September 21, 2000, the Commission has not received any further comments on this subject.

The modifications to the proposed regulation would not require a change to the Draft EA because the modifications either do not affect the impact of the potential disposal project at Middle Harbor or would reduce the environmental impact because those modifications help ensure that the habitat-creation goals are achieved.

The Draft EA was prepared in conformance with the Commission’s regulations (California Code of Regulations (CCR), Title 14, Natural Resources, Division 5, **San Francisco Bay** Conservation and Development Commission. Vol. 19, Chapter 7 (Article 4, Section 11511-11521), which have been certified by the Secretary of State as functionally equivalent to the California Environmental Quality Act, and found that the proposed regulatory amendment would not result in a significant adverse environmental impact.

In conclusion, the staff recommends that the Commission approve the EA as part of its adoption of the proposed regulatory amendment.

Responses to Public Comments

Response to Written Comments

The following are responses to written comments received from the public on the proposed amendment to the regulation and the Draft EA. A copy of each written comment received to date is attached to this report. Written comments received after December 1, 2000, concerning further modifications published on November 21, 2000, will be provided to the Commission, along with responses, at the December 7, 2000, Commission meeting.

1. Letter of June 20, 2000, from Joseph Wong, Director of Engineering, Port of Oakland.

Comment: The proposed regulation should be amended to correctly and more completely refer to the Oakland Harbor Navigation Improvement Project and to the plan prepared by the U. S. Army Corps of Engineers (Corps) and the Port. References to the plan should specify that the manner of plan implementation is demonstrated to have a high likelihood of success in meeting the goals, and provides a combination of monitoring, adaptive management and corrective measures, and the necessary financial commitments to support them. Also, the legal description of the Middle Harbor should be amended to be more accurate.

Response: Agree. The substance of these changes are incorporated into the proposed regulatory amendment.

2. Letter of July 10, 2000 from Robert T. Battalio, President, California Marine Parks and Harbors Association Inc. Although the letter's "Subject" heading referred to the proposed designation of Middle Harbor, the substance of the letter did not address this regulation, but instead commented on proposed *San Francisco Bay Plan* policies. Therefore, no response is needed.

3. Letter of July 19, 2000 from Joseph Wong, Director of Engineering, Port of Oakland.

Comment: The Draft EA contains factual and editorial errors that should be corrected. The Draft EA should also include project updates.

Response: Agree. These corrections and clarifications are incorporated into the Draft EA.

4. Letter of July 22, 2000 from Dwight Steele.

Comment: The Commission should defer consideration of the regulatory amendment until a planning study, carried out under the Commission's "time-honored" process, is complete.

Response: The proposed regulatory amendment is an action separate and distinct from the proposed policy changes to the Commission's *San Francisco Bay Plan*. The regulation could proceed without changes to the policies because, as required by current policies, dredged material may only be disposed in the Bay at sites designated by the Commission. Consideration of a new designation does not require a policy change, but should involve an evaluation of the site selected, as does the Draft EA. No changes to the regulatory amendment are needed.

5. Letter of October 30, 2000 from Trent W. Orr, representing the Save San Francisco Bay Association.

First Comment: The regulation would allow the Port to dispose of large amounts of dredged material on public trust lands, without a permit, and would thus contravene BCDC's mandate.

Response: Contrary to the commentator's view, the regulation does not authorize a disposal project at the Middle Harbor; a Commission permit would still be required. The designations listed in this regulation were established in response to the *San Francisco Bay Plan* Policy requirement that calls for any in-Bay disposal project to occur only at a site designated by the Commission. Nothing in the language or effectiveness of the regulation, with its limitations on use and location of the disposal sites, precludes the need for a permit or substitutes for findings the Commission must make under its laws and policies.

We do concur, however, that the proposed regulation contains a significant set of criteria placed upon the use of Middle Harbor for a disposal project, and the public might be confused about whether the listed criteria are the only criteria that must be fulfilled when carrying out the project. In fact, the Commission has received more than one comment on this issue (see comment at public hearing of November 2, 2000, by David Lewis with Save the Bay).

In order to respond to this comment and clarify the effect of the regulation, on November 21, 2000, the staff published an additional modification that would clarify that the regulation does not preclude the need for a permit or substitute for findings the Commission must make under its laws and policies. This type of clarifying language has precedence in other sections of the Commission's Regulations Chapter 7 Special Rules that identify and impose limiting criteria on projects that may be authorized by the Commission. For the same reason, similar clarifying language is appropriate in the proposed regulatory amendment.

Second Comment: Unless BCDC requires a permit for the Middle Harbor project, BCDC could not ensure the Middle Harbor project is carried out in accordance with the plans proposed by the Corps and the Port. First, the Corps would obtain a consistency determination, not a permit. Second, the landowner (the Port) would obtain a permit for the fill project only when it inherits responsibility for the project from the Corps, about ten years into the future. This leaves BCDC with no enforceable permit if the Corps places fill improperly, or if the project fails to achieve the expected habitat values and functions. BCDC has no enforcement authority over a third party (here, the Port) to a consistency determination. The Port should not be exempt from the requirements of the McAteer-Petris Act.

Response: Disagree. First, a federal consistency determination is enforceable. When a federal agency such as the Corps proposes a project, that agency generally would not obtain a permit but instead would obtain the Commission's concurrence with its determination that the project is consistent with the Commission's federally approved coastal management program (the federal consistency determination). If the Corps constructs a project inconsistent with the federal consistency determination, the Commission may challenge the Corps' action in court. We agree that this approach may be somewhat more difficult than administratively enforcing compliance with a permit condition. Nevertheless, it is enforceable.

Further, in this case the Port is the property owner of property where the fill would be placed. As the property owner, the Port could be held responsible for fill placed or retained in contravention of Commission approval.

No changes to the regulatory amendment are needed.

Third Comment: The local project sponsor, the Port of Oakland, will be responsible for the operation and maintenance of the Middle Harbor project and so should obtain a permit.

Response: As required by the regulatory amendment, the Port will obtain a permit when it assumes responsibility for operation and maintenance from the Corps. No changes to the regulatory amendment are needed.

Fourth Comment: The proposed regulatory amendment would compromise the Commission's authority, jeopardize its public support, and leave BCDC open to legal challenge. BCDC should not waive its authority in order to facilitate the Middle Harbor project.

Response: As discussed above, the Commission's regulatory authority remains intact. It is not in control of public support and legal challenges that may arise from its decisions. The proposed amendment would not waive its permit authority, but to clarify this point, the staff has amended the regulation to so state.

6. Letter of November 2, 2000 from Julie Jones, attorney with McCutcheon, Doyle, Brown & Enersen, LLP, attorneys for the Port of Oakland.

Comment: In response to Mr. Orr's October 30, 2000, letter on behalf of Save the Bay, Ms. Jones explains the federal consistency process, explains why BCDC retains authority to enforce the federal consistency determination, explains the assurances provided by the Corps and Port that the project will be constructed according to plan and achieve its goals, and comments that the Commission should reject Save the Bay's request.

Response: Comment noted. See the Commission's response to Mr. Orr's letter, above. No changes to the regulatory amendment are needed.

Response to Oral Comments

The following are responses to oral comments received during public hearings on the proposed regulatory amendment and the Draft Environmental Assessment.

1. Comment at August 17, 2000 public hearing by Jim McGrath with the Port of Oakland.

Comment: The Port supports the regulatory amendment so that the Commission can move on to consider the merits of the project. The Port also supports additional regulatory approaches if they would provide additional protection or comfort to the environmental groups.

Response: Comment noted. No changes to the regulatory amendment are needed.

2. Comment at August 17, 2000 public hearing by Martha Chesley with the Bay Planning Coalition.

Comment: The Bay Planning Coalition supports the regulatory amendments.

Response: Comment noted. No changes to the regulatory amendment are needed.

3. Comment at August 17, 2000 public hearing by Marc Holmes. Mr. Holmes referred to his comments on the proposed San Francisco Bay Plan policies that would affect in-Bay disposal of dredged material for habitat creation projects (the prior agenda item) and stated that they also apply to this regulatory amendment.

Comment: The Commission runs the risk of doing significant ecological damage to the Bay by allowing placement of dredged material for habitat creation.

Response: First, the environmental impacts of the proposed regulation that would allow the Middle Harbor project to be considered by the Commission have been evaluated in the Draft EA. The project itself has been separately evaluated through an Environmental Impact Statement/Report, certified by the Port of Oakland. This comment applies mostly to the proposed policies that would affect in-Bay disposal of dredged material for habitat creation projects and requires no change to the regulatory amendment.

Second Comment: The Middle Harbor project is well considered and well designed, and this is distinct from the proposed policies that would open the door indiscriminately to many other projects.

Response: Comment noted. No changes to the regulatory amendment are needed.

Third Comment: The Commission should determine where shallow water habitat projects should be placed before allowing a flood of such projects, but the Middle Harbor project should go forward as a pilot project. The Commission should find some way to authorize the Middle Harbor project other than through the proposed policies, to avoid opening a floodgate of requests to dump dredged material in the Bay at many locations.

Response: Comment noted. The conditional designation of Middle Harbor as a disposal site does achieve this goal to limit a project to this one site. No changes to the regulatory amendment are needed.

4. Comment at September 21, 2000 public hearing by Marc Holmes for the Save San Francisco Bay Association.

Comment: Mr. Holmes reserved his rights to provide comments until the following meeting because the staff announced it would propose further modifications to the regulation.

Response: Comment noted. No changes to the regulatory amendment are needed.

5. Comment at September 21, 2000 public hearing by Jon Amdur for the Port of Oakland.

Comment: Mr. Amdur reserved his rights to provide comments until the following meeting because the staff announced it would propose further modifications to the regulation.

Response: Comment noted. No changes to the regulatory amendment are needed.

6. Comment at November 2, 2000 public hearing by Trent Orr for the Save San Francisco Bay Association. Mr. Orr reiterated his comments provided in his letter dated October 30, 2000 (see above for responses to those comments), and provided the following additional comment:

Comment: The proposed regulatory amendment should specify that the Port must obtain a Commission permit for the placement of dredged material on its property.

Response: This suggestion is rejected. First, the purpose of this regulation section is not to determine who must obtain a permit. This regulation contains only the Commission's designation of sites that may be used for the disposal of dredged material. The determination of the proper applicant for a permit is governed by the McAteer-Petris Act that requires any applicant to have a property interest sufficient to carry out the work. Whether the Corps has sufficient property rights to carry out the work will be determined when the Commission evaluates the consistency determination. No changes to the regulatory amendment are needed.

7. Comment at November 2, 2000 public hearing by Jim McGrath with the Port of Oakland.

Comment: The Port supports the amendment.

Response: Comment noted. No changes to the regulatory amendment are needed.

Second Comment: Mr. McGrath responded to Mr. Orr's testimony and explained that the Port and Corps are committed to the Middle Harbor project, and this commitment is more important than answering the question whether a permit should be issued to the Port. Further, he noted that the Commission has not routinely required the property owner of a designated in-Bay disposal site to obtain a permit, for example, at the so-called Alcatraz disposal site. There, the Commission has not required the City of San Francisco to obtain a permit for the Corps' placement of dredged material at the site. Why then should the Commission require it at Middle Harbor?

Response: Comment noted. No changes to the regulatory amendment are needed.

8. Comment at November 2, 2000 public hearing by David Lewis with the Save San Francisco Bay Association.

Comment: The regulation should require the Port to obtain a permit for placement of dredged material on its property.

Response: This suggestion is rejected. First, the purpose of this regulation section is not to determine who must obtain a permit. This regulation contains only the Commission's designation of sites that may be used for the disposal of dredged material. The determination of the proper applicant for a permit is governed by the McAteer-Petris Act that requires any applicant to have a property interest sufficient to carry out the work. Whether the Corps has sufficient property rights to carry out the work will be determined when the Commission evaluates the consistency determination. No changes to the regulatory amendment are needed.

Proposed Amendment to Regulation Section 10713.5(e)

Add text shown underlined and delete text shown ~~struck through~~, as follows.

10713.5 In-Bay Dredged Material Disposal Sites. As used in the San Francisco Bay Plan and in these regulations, the ~~designed~~ designated in-Bay dredged material disposal sites are as follows. These designations do not preclude the need for a Commission permit to dispose of dredged material at the sites or substitute for the findings that may be required by the McAteer-Petris Act (Cal. Government Code Section 66600 et seq.) and the San Francisco Bay Plan.

....

(e) Middle Harbor at the Port of Oakland:

(1) For a project ("the project") that satisfies the following criteria:

- (A) the purpose of the project is to enhance in-Bay habitat for plants, fish and wildlife;
- (B) the project includes a one-time placement of dredged material, in the amount of approximately 5.8 million cubic yards, taken from the Oakland Harbor Navigation Improvement (-50 Foot) Project to create shallow water habitat;
- (C) the project would be undertaken as specified in a plan ("the Plan") that is prepared by the U.S. Army Corps of Engineers and the Port of Oakland and approved by the Commission;
- (D) the Plan specifies the following elements: (i) the restoration and enhancement performance criteria for the project including the creation of eelgrass and other shallow water habitat; (ii) the design required to restore or enhance fish and wildlife habitat; (iii) the monitoring, adaptive management, and corrective actions that will be employed to ensure that the Plan's performance criteria are achieved; (iv) the periods of time needed to achieve the performance criteria, to monitor, and to employ adaptive management and corrective actions if needed; (v) the duties of the U. S. Army Corps of Engineers in implementing the Plan; (vi) the duties of the Port of Oakland once it takes over responsibility for the project from the U. S. Army Corps of Engineers; (vii) the management agency with wildlife management experience that will manage the Middle Harbor enhancement area once the project has been successfully completed; (viii) the management agency's duties as manager of the enhancement area; (ix) the method to determine the success or failure of the project through a performance criteria evaluation period; and (x) the process to determine the actions to be employed if the project fails to achieve the Plan's performance criteria within the specified time frames;
- (E) the manner of implementing the Plan has been demonstrated to have a high likelihood of success in achieving the Plan's performance criteria within the specified time frames;

- (F) the Port of Oakland makes a legally binding commitment to secure two permits from the Commission to fulfill its responsibilities as specified in the Plan: (i) at the time it assumes responsibility for the project from the U. S. Army Corps of Engineers at the commencement of the Plan's performance evaluation period; and (ii) at the conclusion of the Plan's performance evaluation period;
 - (G) the Port of Oakland provides the necessary legal and financial instruments to support its responsibilities as specified in the Plan; and
 - (H) the Project sponsors make a legally binding commitment to take action, as required by the Plan, if the project fails to achieve the Plan's performance criteria within the specified time frames; and
- (2) Consisting of an area within the Middle Harbor bounded by the shoreline, wharf faces, and Middle Harbor Shoreline Park improvements which lie northeasterly of the following two courses:

Beginning at a point on the Southern Pacific Mole with Latitude 37°47'59.864" N, Longitude 122°19'48.019" W (NAD83) having grid coordinates of "N"=2118915.608 and "E"= 6032967.336; thence North 72°04'00" West 3435.03 feet to a point on the common boundary line between the city and county of San Francisco, Oakland and Alameda County, said point having coordinates of "N"=2119973.287 and "E"=6029699.201; thence North 05°15'46" East 349.79 feet to the southwesterly corner of the 7th Street Terminal face of wharf having coordinates of "N"=2120353.305 and "E"=6029875.128.